Supreme Court, U.S.
FILED
OCT 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-453

In The
Supreme Court of the United States
October Term, 1985

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

vs.

CITY OF SAN ANTONIO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

(1) Can the Eastland opinion, which did not address the question of the meaning of "payment in lieu of taxes" be law of the case on that point?

(2) Although the appellate decision appealed from by petitioner reaches a different result, for procedural reasons, than did the Eastland decision does this fact trigger the equal protection clause?

(3) Does the equal protection clause even apply to a political subdivision of the state?

LIST OF THE PARTIES

(1) San Antonio Independent School District, Petitioner
(2) City of San Antonio, Respondent

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Respondents respectfully submit this their Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Texas.

CITATION TO OPINIONS BELOW

Petitioner accurately states the status of the opinions below.

———o———

JURISDICTION

The petitioner does not present a case of judicial denial of equal protection. The equal protection clause does not assure uniformity of judicial decisions or immunity from judicial error. *Beck vs. Washington,* 82 S.Ct. 955, 369 U.S. 541, 8 L.Ed. (2) 98, rehearing denied 82 S.Ct. 1575, 370 U.S. 965, 8 L.Ed. (2) 834. *Sorelas vs. Sheehan,* 326 F (2) 490, Cert. Den. 84 S.Ct. 1334, 377 U.S. 932, 12 L.Ed. (2) 296. *Delia vs. Court of Common Pleas of Cuyahoga County,* 418 F (2) 205, Cert. Den. 90 S.Ct. 174, 396 U.S. 886, 24 L.Ed. (2) 161. Furthermore, equal protection is a right vested only in persons—not in political subdivisions. *Pennsylvania vs. New Jersey,* 426 U.S. 660, 49 L.Ed. (2) 124.

———o———

STATEMENT OF THE CASE

The petitioner's recitation of the factual basis of this case, under petitioner's caption STATEMENT, is essentially correct except for a few assertions which are of little consequence. However, such recitation does not fully apprise this Honorable Court of the legal issues in the first case, in which petitioner and eleven (11) other school districts were defendants in a suit brought by respondent to collect portions of their gas and electric bills which such districts had not paid.

It is not respondent's purpose to relitigate the aforementioned case nor the one at bar, but in order that the Court may see why there is no constitutional issue here the Court really must be apprised of the issues, and thus the merits, of both the first case and the one at bar. No one, regardless of his legal acuity, can read the "Eastland Opinion" (Petitioner's Exhibit 6) and perceive therefrom the contentions of the parties in the first case, nor can anyone determine from the Eastland decision what the merits of that case were.

Two statutory issues were involved in the first case. They were:

1. Whether Art. 1446c, sec. 48 applied to the City of San Antonio and

2. What, if such provision did apply, was the meaning of the term "payment in lieu of taxes", which was part of the subject of such provision.

The First Case

Petitioner owns a gas and electric system, subject to a Trust Indenture between it and the trustees for the holders of revenue bonds issued to finance the system's acquisition.

One of the provisions of the Trust Indenture sets out a priority of payments from the system's revenues as follows:

1. Maintenance and operation of the system.
2. Payment of principal and interest on bonds.
3. Payment in lieu of ad valorem taxes to the City to compensate it for loss of taxes resulting from its purchase of the system.

4. Improvements and extensions to the system.

5. Contingency fund.

6. Reimbursement to the City for funds paid by the City to the system for City's gas and electric use.

7. A sum in cash which, when added to (3) and (6) will bring the system's total payment to the City to 14% of the gross revenues of the system.

It is undisputed that all of the system's prescribed payments to the City are authorized by state statute (Arts 1111-1118, R.C.S. of Texas).

From the above it is easy to see that there are three (3) separate components of the system's payments to the City:

1) Payment in lieu of taxes.

2) Reimbursement for City's gas and electrical expense.

3) A cash payment in addition to (1) and (2) sufficient to bring the total payment to the City to 14% of the system's gross revenues.

Not all of the system's payments to the City are in lieu of taxes.

The petitioner here and the rest of the defendants in the first trial deducted from their monthly gas and electric bills 14% thereof, what they believed was the total of such bills' amounts which was attributable to the City's gas and electric system's payments to the City in lieu of taxes. This continued for several years and the amounts deducted totalled several million dollars. Their reliance was upon Art. 1446c, Sec. 48, V.A.T.S., which reads as follows:

> No payments made in *lieu of taxes* by a *public utility* to the municipality by which it is owned may be con-

sidered an expense of operation for the purpose of determining, fixing, or regulating the rates to be charged for the provision of utility service to a school district or hospital district. No rates received by a *public utility* from a school district or hospital district may be used to make or to cover the cost of making payments *in lieu of taxes* to the municipality by which the *public utility* is owned. (Emphasis added.)

Article 1446c's definition section reads in part as follows:

Sec. 3(c) *The term "public utility" or "utility", when used in this Act, includes* any person, corporation, river authority, cooperative corporation, or a water supply or sewer service corporation, or any combination thereof, other *than a municipal corporation*, or their lessees, trustees, and receivers, now or hereafter owning or operating for compensation in this state equipment or facilities for:

(4) the transmitting, storing, distributing, selling or furnishing of potable water . . . or the collection transportation, treatment, or disposal of sewage . . . *The term "public utility" or "utility" includes any municipally owned gas or electric utility, whether owned separately or in conjunction with other municipalities, operated by a board of trustees which as of May 1, 1975 was not directly appointed by the governing body of the municipality, and does not include any other municipally owned utility unless otherwise provided in this Act.* (Emphasis added.)

(San Antonio's gas and electric utility is operated by a board of trustees which as of May 1, 1975 was not appointed by the governing body by the municipality, by virtue of a provision of the aforesaid Trust Indenture).

Sec. 3(o) "Municipally-owned utility" means any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(San Antonio's utility is owned, operated and controlled by the municipality).

Different regulations were imposed by the statute upon public utilities than those imposed upon municipally-owned utilities. San Antonio's gas and electric utility is a "municipally-owned utility" unless the above underlined Sec. 3(c)4 makes it a "public utility". That was clearly the *purpose* of the 3(c)4 definition, but the subject definition was held to be violative of Art. III, Sec. 56, *State Constitution*[1] even before this case was tried the first time and all courts in the first trial were furnished with copies of the opinion so holding. *Garrett Morris vs. City of San Antonio,* 572 SW(2) 831, no writ (cited in Petitioner's brief). The latter case also held that San Antonio's gas and electric utility was a "municipally-owned utility" for all purposes under the Act. (1446c). The Eastland Court did not disagree with the *Garrett Morris* case.

The payments made by the system to the City were characterized by the State Supreme Court in a former case between these parties as follows:

> Part of this amount is a sum to reimburse the City in lieu of ad valorem taxes that would be received if the systems were not municipally owned. And part of the amount is reimbursement of the amount expended by the City for its own electric and gas services and also for traffic and street lighting facilities. Anything further paid under this clause by the Indenture will be all gain to the City. 550 SW(2) 263-264. *San Antonio Ind. School Dist., et.al. vs. City of San Antonio.*

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(1) Art. III, Sec. 56 prohibits the passage of local and special legislation relating to the affairs of cities where a general law can be made applicable.

Now, in view of the foregoing undisputed facts, the respondent City contended that Sec. 48 cannot apply to the City because Sec. 48 applies only to "public utilities" making "payments in lieu of taxes" to the municipalities which own them. San Antonio's system is not a "public utility" under the *Garrett Morris* decision.

That simple conclusion was the thrust of the City's case from its inception and in response to it we got the Eastland opinion. (Petitioner's Brief, Appendix 6).

But there is more. The City contended alternatively in its pleading in the trial court and by way of crosspoint on appeal that if the foregoing conclusion was mistaken, for whatever reason, and that Sec. 48 *did* apply to the City such section nevertheless applied only to the *in lieu of tax* payment made by the system to the City. It did not apply to the reimbursement by the utility to the City for the latter's gas and electric expense nor did it apply to the cash payment made by the utility to the City, which payments the Supreme Court had characterized in the above language.

The Eastland opinion ignored this crosspoint. This fact was pointed out to the Eastland Court by timely filed motion for rehearing, which was summarily denied, and was pointed out to the State Supreme Court in City's Application for Writ of Error, which was denied, and in City's Motion for Rehearing on Application for Writ of Error, which was denied.

So when the Eastland Court held that Sec. 48 applied to the City in spite of the unconstitutional Sec. 3(c)4 definition and in spite of the City's being a "municipally-owned utility" it became necessary for that court to deal

with the "lieu of tax" question, which it did not do. *The case at bar was brought forward by the City, after remand by the Eastland judgment, in order that there might be a judicial pronouncement of the meaning of "payment in lieu of taxes", as that term appears in Sec. 48.*

The Case At Bar

The State Supreme Court's refusal to review the Eastland decision on the only holding it expressly made (that Art. 1446c, sec. 48 applied to respondent) would have precluded respondent from re-litigating that particular matter. However, it was felt that since the Eastland decision pronounced no holding on the question of the meaning of the term "payment in lieu of taxes" that perhaps a successful argument could be made on retrial and appeal to the effect that such decision was not law of the case on that particular point. Consequently, only the question of the meaning of the term "payment in lieu of taxes" was brought up on appeal from the trial court's judgment, after remand, against the respondent in the case at bar.

The Appeal's Court's decision in favor of the respondent is contained in Petitioner's Brief, Appendix C, and the opinions of Justices Dial and Cadena on both the inapplicability of law of the case and the meaning of the term "payment in lieu of taxes" are, it is submitted, adequate reply to petitioner's argument here that law of the case should have been applied. Petitioner's argument that res judicata arises, as to petitioner, from the Eastland decision is answered by the obvious assertion that the Eastland decision was not final as to petitioner.

It is true that one case resulted, for procedural reasons, in two (2) intermediate Appellate Court decisions,

by different courts, conflicting in result but not in express holding. The Eastland decision resulted in the school districts' which had filed motions for summary judgment being absolved of the duty of paying any portion of the amount for which respondent had sued them. But the petitioner, under the decision in the case at bar, must pay all the sums for which it was sued except the fractional equivalent of such sums as were attributable to the systems "payment in lieu of taxes" to the respondent.

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SUMMARY OF ARGUMENT

Completely aside from the authorities set forth under Jurisdiction, supra, the foregoing situation does not mean that petitioner has been denied equal protection of the law by the Appeals Court's decision herein or by the State Supreme Court's refusal to review such decision.

Although, respondent considered that the Eastland decision was incorrect in the only holding it made—i.e., that sec. 48 applied to respondent—that decision persuaded respondent to drop its claim of inapplicability on retrial involving only petitioner because respondent was concerned that such case would be held to be law of the case in spite of the patent error in that holding. After all, the State Supreme Court had clearly accepted Eastland's decision on such holding, but had not accepted Eastland's decision on the question of the meaning of "payment in lieu of taxes" because Eastland made no decision on that question.

Aside from the authorities cited under JURISDICTION to the effect that equal protection is not violated

by inconsistent judicial decisions and that political subdivisions have no right to equal protection, anyhow, respondent has been unable to locate any case involving a litigant's claiming that he was denied equal protection because another litigant received more benefit from an erroneous decision than did the complaining litigant.

The respondent should add that shortly after the Eastland decision became final as to the other school districts, the San Antonio City Council (the rate-making body) set a school district rate that did not contemplate as operating expenses *any* of the three (3) components of the payment from the system to the City. This rate has been and is being applied to the petitioner as well as to the other districts in spite of the holding of the Appeals Court herein, upheld by the State Supreme Court. In other words petitioner has been treated ratewise exactly like all the other school districts since shortly after the Eastland decision became final. (Please see Affidavit of Crawford B. Reeder, Exhibit A, attached).

It is the position of the respondent City that the effect of the State Supreme Court's refusal to review the second decision herein (San Antonio Appeals Court) is to allow gas and electric rates of respondent's utility to include allowance for recoupment of all payments by the utility to the City except payments in lieu of taxes. The City Council is preparing to adopt a new rate ordinance to effectuate this, making the same applicable to *all* school districts.

Additional litigation in the state courts is expected to result from this; but that will be the subject of another lawsuit.

———o———

CONCLUSION

Petitioner has failed to state a denial of equal protection of the laws resulting from conflicting Appellate decisions.

Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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/s/ Lowell F. Denton
LOWELL F. DENTON
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EXHIBIT A

STATE OF TEXAS)
)
COUNTY OF BEXAR)

On this day personally appeared before me, the undersigned authority, CRAWFORD B. REEDER, known to me to be the person and official whose name is signed hereto, and on his oath stated as follows:

My name is CRAWFORD B. REEDER. I am First Assistant City Attorney for the City of San Antonio and have held such position for the past ten (10) years. I have handled the case of City of San Antonio et al. vs. San Antonio Independent School District, et al., since its inception.

Shortly after the judgment of the Eastland Court of Appeals became final the rates imposed on all school districts, including the petitioner herein, for gas and electricity were reduced by elimination from such rates of allowance for the recoupment of all of the Public Service Board's payments to the City.

/s/ Crawford B. Reeder
CRAWFORD B. REEDER
First Assistant City Attorney

SWORN TO AND SUBSCRIBED this 3rd day of October, 1985.

/s/ Carol M. Knippa
CAROL M. KNIPPA, Notary Public
Bexar County, Texas

MY COMMISSION EXPIRES
11-30-89

(SEAL)